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CONTENTS.

LECTURE

LECTURE THE SECOND.

OF CIVIL, POSITIVE, OR INSTITUTED LAW.

HAVING treated of that primeval moral Law, to which all men are naturally ſubjected by their Creator, and the means of attaining to the knowledge of it, I proceed now to take a general view of the works of human legiſlators.

THESE *poſitive inſtitutions* are termed Civil Law, as being not univerſal, like the former; but, according to the expreſſion in the Imperial Inſtitutes[a], *proprium ipſius civitatis*, peculiar to ſome political community or ſtate; thus, it is there added, we may ſpeak of the civil law of the Athenians, of the Romans, or any other people. They ſuppoſe therefore the exiſtence of civil ſociety, and conſequently lead us firſt to enquire what is underſtood to be a nation, uſing its own laws, and deſcribing by its boundaries the ſphere of their operation.

THE wants, the fears, and the natural ſociability of mankind, co-operating with united ſtrength, ſo forcibly call upon us to aſſociate for mutual defence and accommodation, that it is difficult to conceive, there ever exiſted a number of individuals, living together in the ſame territory independently, and

[a] *l. i. t. 2. le. 1.*

without any order or government; which Plato[b] ſeems to treat as an utter impoſſibility. Barbeyrac[c] indeed affects to recount inſtances of this kind; and Puffendorf[d] aſſerts, that it was not peculiar to antient Sicily, to have ſuch inhabitants as Homer[e] deſcribes, holding no public aſſemblies, obſerving no general laws, or order of government, each bearing ſway in his own family, and careleſs of the conduct and concerns of others. It is equally pertinent to remark, that this account, even by ſo early an author, is introduced among poetical wonders, and adventures exciting admiration. Such ſtate of life, if it ever exiſted, muſt have been of ſhort duration; for the opinion of Ariſtotle, which he ſo often and confidently repeats, "φυσει "πολιτικος Ανθρωπος," is not eaſily refuted[f]. Whether a deſire of mere ſecurity, or a proſpect of the comforts and conveniencies of life, influenced the firſt founders of commonwealths, each of theſe ends was unattainable by an unconnected multitude, at leaſt unleſs we could ſuppoſe not one, but even all men, to excel and be confirmed in virtue, above temptation, and above ſuſpicion. Reaſon, therefore, dictated the neceſſity of civil aſſociations.

BEFORE I proceed to define theſe aſſociations, called nations or ſtates, I ſhall conſider two points, not improper for previous enquiry; one concerning what ought to be deemed the immediate or efficient cauſe of political union at the origin thereof; the other reſpecting the right of migration from an eſtabliſhed commonwealth.

FIRST then I would obſerve, that this promptitude, this aptneſs to civil life, which I have deſcribed as implanted in our

[b] *De leg. l.* iv. [c] On Grot. *de j. b. & p.* §. 1. [d] B. vii. c. 1. §. 5.

[e] Τοισιν δ' ατ' αγοραι βουληφοροι, ουδε θεμιστες·
Αλλ' οιγ' υψηλων ορεων ναιεσι καρηνα
Εν σπεσσι γλαφυροισι· θεμιστευει δε εκαστος
Παιδων ηδ' αλοχων· εδ' αλληλων αλεγουσι.
Odyſſ. ix. v. 112, &c.

[f] Puff. b. vii. c. 1. §. 3.

natures,

natures, and approved by reaſon, reſts only in matter of inducement[g]. That which originally *conſtitutes* a nation, is common conſent, tacit or expreſs; for every ſtate muſt have had ſome origin, before which it did not exiſt as ſuch, however uncertain or remote the period. The people *then* aſſumed relations, which they had not before, which were no part of their natural condition, and which were the reſult of their own free-agency.

NEITHER would it weaken the foregoing argument, if I ſhould add, that the becoming members of civil ſociety is an act from which man ought not morally to abſtain; for nature and reaſon point it out to him as the will of his Creator. But ſtill obedience thereto is an operation of the human will.

IT is common conſent therefore, expreſsly or virtually given, which actually forms and ratifies civil aſſociations. The other matters are reaſons only, however ſtrong, impelling that conſent.

HERE I cannot but take notice, that the celebrated commentator[h] on the laws of England ſeems to ſpeak of the origin of ſociety as a diſtinct thing from that of a civil government, profeſſing he cannot believe there ever was a time when there was no ſuch thing as ſociety. If he refers to economical relations, to parental authority, and ſtipulated maſterſhip and ſervice between individuals; if he means what may be termed domeſtic ſociety, or even ſuch intercourſe as the ſameneſs of country and manners muſt produce; then the ſcriptural account of the primitive ages, certainly (as he alleges) confirms his and the univerſal opinion. For was the non-exiſtence of ſuch ſociety ever aſſerted or ſuppoſed? Does this affect the preſent inquiry? Surely the queſtion relates only to *civil* union; any degree whereof, however rude, is abſolutely inſeparable from ſome kind of civil laws and government. Theſe cannot be disjoined even in idea, and muſt for their validity be referred to one and the ſame original.

[g] v. Puff. b. vii. c. i. [h] Introduct. §. 2.

THE

THE author indeed declares, that when ſociety is once formed, government reſults of courſe. But ſociety *is not formed*, the relations of civil life do not begin, till government is erected. Even ſuppoſing (for the ſake of being more perſpicuous) that men's intention of forming a civil community, was taken as a *previous reſolve*, before they agreed on the conſtitution of any kind of government, ſtill they would not really become a ſtate; ſociety would not be actually formed, notwithſtanding the former vote, till the date of political ſuperiority and ſubjection. Civil ſociety therefore implies the coevality of civil government.

THAT elegant writer contraſts ſociety with an "unconnected ſtate of nature." Hence he appears by ſociety to mean political aſſociation or connexions; for the rights and relations of private life are not excluded from *a ſtate of nature*. If this be the meaning, then the ſcriptural account has been underſtood ſo differently from the ſenſe for which he alleges it, that the patriarchal age is one of the inſtances cited by Barbeyrac to ſhew there was a time when men lived exempt from civil government and laws.

HOWEVER the hiſtorical fact may be of a ſocial contract, government ought to be, and is generally *conſidered* as founded on conſent, tacit or expreſs, on a real, or *quaſi*, compact. This theory is a material baſis of political rights; and as a theoretical point is not difficult to be maintained. For what gives any legiſlature a right to act, where no expreſs conſent can be ſhewn? what, but immemorial uſage? and what is the intrinſic force of immemorial uſage, in eſtabliſhing this fundamental or any other law, but that it is evidence of common acquieſcence and conſent? Not that ſuch conſent is ſubſequently revocable, at the will even of all the ſubjects of the ſtate, for that would be making a part of the community equal in power to the whole originally, and ſuperior to the rulers thereof after their eſtabliſhment.

BUT

BUT why indeed ſhould an expreſs ſocial contract appear ſo ſtrange as never to have happened in any age or country? A multitude of wandering families might perhaps at the ſame time fix their abode, build their contiguous huts, and eſtabliſh an arbitrator of their differences, or agree on ſome rude principles of civil order. But ſince ſuch contract is rarely, *if ever*, contended for as an hiſtorical fact, to ridicule the probability of it is rather a ſuperfluous attempt, though not of an alarming tendency, when it comes from ſo reſpectable a writer as Dr. Tucker; who, in a maſterly manner, maintains an *implied* contract of equal validity with the moſt poſitive *ſtipulation, as to all good political deductions*; nor are we more apprehenſive, when the ſame pleaſantry is indulged by the celebrated Commentator, who, though he declines ſpeaking of the origin of government, admits in terms the natural equality of mankind.

I HAVE here been ſpeaking of the original formation or cement of any civil ſociety or ſtate. For, as to the ſecond point, reſpecting the right of migration, I am far from maintaining, that any conſent, tacit or expreſs, is eſſential to induce the duty of ſubjection from individuals born under an eſtabliſhed government.

THE obligation of *natural* law is of univerſal extent and perpetual duration. The duties alſo of *civil* life, though not indeed equally permanent or ſacred, cannot, I apprehend, be diſcarded at pleaſure; and that no individual has a moral right to caſt off his allegiance to the ſtate, and migrate into another country, *contrary to the declared will of the ſovereign power*. I do not meddle with the queſtion, whether colonies have any right, and in what ſituation of affairs, to ſeparate from the ſuperior ſtate: as to which point I have met with nothing ſufficient to inform my judgment: but as to individuals, they cannot ceaſe to be under the protection of government, and of courſe to owe ſubjection to it, while they are carrying ſuch deſign of ſpontaneous exile into execution. To obey alſo the lawful commands of our civil governors, is a duty binding on

the conſcience. To theſe conſiderations may be added that of gratitude, which is too much excluded from political and national concerns; and another principle, virtuous in itſelf, and laudable under due regulations, I mean that love of our country, which ſhould incite us to promote its welfare and defence.

ANY reſtraint indeed on the power of migration, is repugnant to the panegyric which Cicero[i] pronounces on the antient laws of Rome. "*O jura præclara atque divinitùs jam inde a principio Romani nominis a majoribus noſtris comparata, ne quis noſtrûm plùs quàm unius civitatis eſſe poſſit: (diſſimilitudo enìm civitatum varietatem juris habeat neceſſe eſt) ne quis invitus civitate mutetur, neve in civitate maneat invitus. Hæc enim ſunt fundamenta firmiſſima noſtræ libertatis, ſui quemque juris et retinendi et dimittendi eſſe dominum.*" It is true likewiſe, that among the Roman laws of a more recent date, we find it written: "*de ſuâ quâ civitate cuique conſtituendi facultas libera eſt*[k]." But Grotius[l], in explaining this and another paſſage in the Digeſts to the ſame effect, ſhews that the licence in effect was only to remove from one part of the Roman ſtate to another, and was founded in political expedience. And although Mr. Locke[m] maintains, that a child is *born* a ſubject of no country or government, yet, ſincerely profeſſing a general deference to his opinions, I ſhall aſſert, that the laws of this country ſeem to have reaſon on their ſide, when they ſpeak of *natural-born* ſubjects, and when they conſider allegiance due from the time of protection afforded, without regard had to the poſſeſſion of lands or other property.

IN ſhewing how ſubjection to any ſtate may ceaſe and determine, Puffendorf[n] deſcribes it as one mode, when a man by *permiſſion* of his own commonwealth, voluntarily removes into the territories of another, and ſettles himſelf and his effects there, and the hopes of his future fortunes. But whether ſuch permiſſion

[i] *pro L. Balbo.*
[k] *D. l.* xlix. t. 15. l. 12, p. 9.
[l] B. ii. c. 5. §. 24.
[m] On Civ. Gov. §. 118.
[n] B. viii. c. 11.

miſſion generally exiſts or not, he refers to the municipal inſtitutions of each country to determine: and this he holds to be the juſt criterion, even in the caſe of ſuch who being of foreign birth aſſociate themſelves to any eſtabliſhed commonwealth. Hence it may be inferred, that in the opinion of this writer, who made ſuch deep reſearches into firſt principles, there is at leaſt no repugnance to natural morality, in municipal laws, which, like thoſe of Muſcovy[o] lay a general reſtraint, or, like thoſe of England, provide a ſpecific mode to be occaſionally uſed of preventing the migration of any one or more citizens.

The ſame author aſſerts, that, where there is a general licence of migration, thoſe who remove ought in duty and honour to ſignify their projected departure, unleſs there is good reaſon to believe, that it will not be a matter of national concern. He maintains, that perſons in employment ought to have the expreſs conſent of the ruling powers, whoſe territories they purpoſe to abandon: and he agrees with Grotius[p], that we ought not, from principles of moral obligation, to deſert and renounce our country, oppreſſed with public debts, involved in calamities, or threatened with invaſion. But in one point they differ. Grotius affirms, that ſuch migrations ought not, without the conſent of government, to be made in companies very large and numerous, in as much as it is one thing to draw water out of a river, and another to divert the courſe of it: ſuch diſpeopling would be ruinous to the ſtate, and defeat the ends of civil ſociety: *and on moral occaſions, what is neceſſary to obtain the end, has the force of law.* This ſentiment, however, Puffendorf ſtrenuouſly oppoſes, arguing, that what is lawful for one, is lawful for many; but with leſs ſhew of reaſon, for both this and the former points, in which they are unanimous, ſeem to ſtand on the ſame foundation, a due and conſcientious regard to be had to the public ſafety and proſperity.

[o] Grot. b. ii. c. 5. §. 24.
[p] Ibid.

I NOW recur to the definition of nations or ſtates. Vattel [q] deſcribes them to be bodies politic, or ſocieties of men united together to procure their mutual ſafety and advantage by means of ſuch their union. This account, however, will be thought, I apprehend, too comprehenſive; for it might include every company of pirates, robbers, and banditti, aſſociated on account of their crimes. The like is remarked by Cicero [r]: "*Quæ eſt enim civitas? omniſne conventus etiam ferorum et im-*" *manium? omniſne etiam fugitivorum ac latronum congregata* "*unum in locum multitudo? certè negabis.*" The definition therefore given of a ſtate by the ſage and moral Grotius [s], is, a complete or ſelf-ſufficient body of free perſons, united together for their common benefit, to enjoy peaceably *their own rights, and to do right to foreigners*. What he calls a complete or ſelf-ſufficient body, (in Ariſtotle, "αυταρκης,") may be thought to imply independence in regard to other nations, and thereby to diſtinguiſh ſuch community from thoſe inferior aſſemblages, which, within the limits of all or moſt countries, or within their empire and controll, have formed ſubordinate parts or appendages of the commonwealth, under the names of corporations, and other municipal ſocieties unincorporated, colonies, and provinces. This quality however of independence is more fully marked by the character of doing right to foreigners, which, in its proper latitude, can be true only of a ſovereign ſtate. Such a community, Vattel [t] obſerves, has its affairs and intereſts, it deliberates and takes reſolutions in common, and thus becomes a moral perſon, having an underſtanding and a will peculiar to itſelf, and is ſuſceptible of obligations and laws. Every ſtate muſt, like individuals, be ſubject to certain rules, becauſe it muſt anſwer the ends (which have been juſt mentioned) of its origin and firſt formation; and every end propoſed implies the expediency of a certain line or means, by which it is to be attained. Theſe rules (as it alſo hath appeared) may reſpect either other ſtates, and are then called the

[q] Law of nat. prelim. §. 1. and b. i. c. 1. §. 1.
[r] Parad. iv.
[s] B. i. c. 1. §. 14. and b. iii. c. 3. §. 2.
[t] Law of nat. prelim. §. 2.

Law

Law of Nations, or may relate ſeparately to the one particular ſtate, and are then termed *Civil or Municipal Law*. It is the latter which eſtabliſhes the various relations of civil life, and accordingly regulates the conduct of the citizens towards each other. This muſt be done by precepts of general extent and influence, controlling the private judgments of individuals, which would often be erroneous, and always breed confuſion, however upright their intentions. The neceſſity of rules infers the neceſſity of political ſuperiors; and indeed ſome have begun their deſcription of a ſtate by calling it a conjunction of perſons governing and governed; and others ſpeak of the fitneſs of civil ſociety and civil government as the ſame point to be demonſtrated [u]. "*Sine imperio* (ſays Cicero [x]) *nec domus ulla,* "*nec civitas, nec gens, nec hominum univerſum genus ſtare, nec* "*rerum natura omnis, nec ipſe mundus poteſt.*" On theſe principles it has been affirmed [y], that magiſtracy is by the law of nature, reaſon aſſuring men that they cannot well ſubſiſt without civil ſociety, nor civil ſociety without government.

THE ſeveral kinds of magiſtracy will be treated of in the next Lecture.

THE rules affecting this great relation of governors and ſubjects, eſpecially ſuch as conſtitute the legiſlative authority, are the fundamental laws, the primary part of internal polity: the other branch whereof reſpects the conduct of private citizens to each other, and will be chiefly kept in view in the ſequel of the preſent diſquiſition.

THE neceſſity of adding to the ſupreme and primeval law of nature (treated of in the preceding Lecture) a ſyſtem alſo of poſitive laws, will farther appear, by briefly conſidering them as divided into ſuch as denote and puniſh crimes, and ſuch as eſtabliſh the rights of property.

[u] Puff. b. vii. c. 1. [x] *De leg. l.* iii. [y] 3 Bulſt. 28.

To preclude the partial judgment of private ſufferers, the public force muſt, in the proſecution of offenders, be directed by the public wiſdom. The poſitive laws muſt accurately define the ſpecies of crimes, and their reſpective puniſhments. Thus, by explicit declarations, a more lively dread of temporal coercion is awakened, the conſciences of brutiſh and inconſiderate men are more alarmed, and violence and wrong are more effectually reſtrained from annoying civil life.

THE ſame neceſſity of poſitive laws appears from viewing ſociety in another light; that is, in regard to property. When the ſpontaneous produce of nature was found inadequate to the wants of any community, agriculture was rewarded with a permanent right in the improved ſoil. As men advanced in civilization, arts and commerce introduced, on the ſolid and rational foundation of common benefit to all, various other ſubjects of property. All theſe were to be regulated and modified by poſitive inſtitutions. It was neceſſary not only to exempt them from intentional malice, fraud, and violence, but alſo to elucidate the ſeveral rights from honeſt doubts and ſcruples, and to determine inevitable litigations.

SOCIETY therefore induces a large acceſſion of poſitive laws; all of which are available by conſent. But this conſent muſt be explained. Sometimes it refers to the general concurrence given or implied to the conſtitution of the legiſlative power; ſometimes the people immediately, or by delegation, participate in that authority; and ſometimes long and uniform cuſtom beſtows a ſanction, as evidence of univerſal approbation and acquieſcence. For in moſt countries, I believe, a diſtinction has been obſerved between laws expreſsly enacted, and ſuch as are ratified by uſage. The former are commonly reduced to writing; but may, like thoſe of Lacedemon, be committed only to memory. Laws ratified by cuſtom, are generally the moſt antient, and eſteemed highly ſacred, having been approved by the experience of ages. The Roman lawyer [z] therefore,

[z] *D. l.* i. *t.* 3. *l.* 32. *p.* 1.

fore, well inforces the principle, on which the authority of cuſtom is grounded, who writes, "*Inveterata conſuetudo pro "lege non immerito cuſtoditur. (et hoc eſt jus quod dicitur moribus "conſtitutum.) Nam cum ipſæ leges nullâ aliâ ex cauſâ nos te- "neant, quam quod judicio populi receptæ ſunt, merito et ea, quæ "ſine ullo ſcripto populus probavit, tenebunt omnes: nam quid "intereſt, ſuffragio populus voluntatem ſuam declaret, an rebus "ipſis et factis?*"

CUSTOMS are very frequently ſpoken of as unwritten law, although they have long ceaſed to depend ſolely on tradition and practical obſervation, being recorded in authentic teſtimonials. But they are ſo denominated, becauſe their ratification is referred to the tacit conſent of the people, and that for a long duration: whereas other laws are expreſsly declared at the time of their enaction.

WE are next led to inquire into the *ſubject matter* of poſitive or inſtituted laws; which in general may be ſaid to be the actions of thoſe for whom the laws are made [a]. Civil ordinances therefore contain duties of moral and of poſitive obligation. By obedience to the former, the ſubjects muſt become better men as well as better citizens: the latter are founded in expedience. Whatever is juſt, is indeed inſeparably connected with utility rightly underſtood. But ſome regulations are ſo far ſimply beneficial, that they have no antecedent inforcement in the ſyſtem of morality. Hence civil laws have been [b] called mixedly and merely human. The former are founded on ſome rule of that ſupreme law, rational or revealed, to which all men are eſſentially ſubject. Thus the laws which puniſh theft, or which provide for reparation of injuries, may be referred to the moral precept, *alterum non lædere*, although the modes be of men's invention. The laws merely human are ſuch, for example, as thoſe which determine the courſe in which inheritable eſtates ſhall be tranſmitted by deſcent.

[a] Puff. b. i. c. 6. §. 16.

[b] Hook. Eccl. Pol. b. i. §. 10.

WE

WE are not however to imagine it practicable, that moral perfections can be inforced by civil ſanctions. There are duties of piety, humanity, and fidelity, which muſt be, and always are, left to the influence of religion. This *Puffendorf*[c] very reaſonably accounts for, as well "becauſe the controverſies "about them would be very perplexed and intricate, as to pre-"vent the multiplication of litigious ſuits, and alſo that the "good and virtuous might not be deprived of the moſt va-"luable part of their character, the doing well out of reve-"rence to their Creator, without regard to the fear of human "penalties; for this they *muſt neceſſarily loſe*, when there is "no diſtinction made, whether a man doth well out of love to "virtue, or out of fear of puniſhment." Therefore avarice, ambition, hypocriſy, and many other vices, unleſs they produce ſome external enormity, are unnoticed by human laws. The *Lex Julia de ambitu*[d] among the Romans, extended only to thoſe who, from ambitious motives, were guilty of bribery at elections, or ſome other open and flagrant act.

AND here I ſhall venture to quote the expreſſion of an author (who ſeldom deſerves commendation) when he calls the law of nature the unwritten civil law; the meaning of which may be, that poſitive inſtitutions, depending on the fundamental rules of general morality, look and *tacitly* hope for an unconſtrained obedience to thoſe rules, which it is not in their power to exact. But where the ſame writer meaſures right and wrong abſolutely by poſitive ordinances; where he argues, that becauſe men on their entrance into civil ſociety bind themſelves to obey the commands of the ſovereign power, and thus being obliged to obedience before they know what will be commanded, are therefore obliged univerſally and in every reſpect;

[c] B. viii. c. 1. §. 1. and c. 3. §. 14.

[d] *Nihil vero fraudum earum, quo ſuperioribus legibus coercentur, formidaturi ſumus a magiſtratibus, ſi ab illorum creatione fraudem omnem amovebimus: ac reipublicæ gubernacula deferemus ad meliores; juſtis, liberis, incorruptis comitiis. Ideò legum omnium utiliſſimæ ſunt leges contra ambitionem latæ.—Quis enim argueret legibus facta principum? Hinc et de lege Juliâ [hâc ſcilicèt de ambitu] ſctis levis mentio eſt in digeſtis.* Gravin. de legibus et ſenatus conſultis, §. xcviii.

here

here he plainly aims to ſubvert the foundations of morality[e]. But the ſophiſtry admits of a ready anſwer: for men do not enter into ſociety with a view of ſuperſeding or diſengaging themſelves from the laws of nature; but the chief end of civil government, on the contrary, is, that thoſe laws may be protected from violation, and ſecured by additional ſanctions. When civil laws therefore groſsly and manifeſtly contradict that ſupreme law, to which all men are eſſentially ſubject, ſuch immoral or irreligious ordinances ought in conſcience to be diſobeyed. But in ſuch caſes we ſhould receive the cleareſt and matureſt conviction; and *ſometimes* perhaps diſtruſt our own rather than the public judgment.

ANOTHER caution may be inferred from what has been before obſerved, that where the civil laws lay no particular reſtraint, we are not always to interpret ſuch ſilence into ſubſtantial permiſſion, but only that the matter, being not proper for their interference, is left to the divine coercion.

AS, however, we ought not to overthrow natural equity by conſequences drawn from arbitrary inſtitutions, ſo on the other hand we ought not always nor haſtily to allege ſome *general* principle of moral duty, which may probably admit of reſtrictions and exceptions, in oppoſition to ſpecial proviſions of municipal law. This notion at leaſt has prevailed among very celebrated juriſts; and is illuſtrated by the following example[f]: That the author of any damage ought in conſcience to repair it, is a general tenet of ethics. Now if we extend this rule to the caſe of a debtor, who makes default of payment at the time appointed, by means whereof the creditor ſuſtains ſome extraordinary detriment, ſuch application of the maxim is ſaid to be unjuſt. The municipal law apportions the ſatisfaction by the regular computation of intereſt for the loan. To make debtors liable for ſuch accidental damages, would breed endleſs

[e] V. Puff. b. viii. c. 1. §. 1, 2, 3. and Hobbes there cited.

[f] Domat's Treatiſe of laws, c. xi. §. 26. *D. l. xix. t. 1. l. 21. p. 3.*

and

and intricate litigations. We muſt alſo recollect another rule of equity, That in general men ſhould not be accountable for unforeſeen contingencies. Theſe obſervations, however, ſeem rather to denote what ſtrict juſtice might demand, than what generous benevolence, with ſufficient ability, might reaſonably beſtow.

CIVIL legiſlators have no rightful authority to forbid what the law of nature injoins, or to injoin what that forbids. But they may lay an interdict on things *permitted* only by the law of nature. They may *retrench natural liberty* by creating an acceſſion of poſitive duties. It is the opinion of the celebrated Commentator on the Laws of England, that ſuch civil inſtitutions affect the conſcience with an obligation only of ſubmitting to the penalty if levied: which general aſſertion he illuſtrates[g] from thoſe proviſions in this country which are uſually denominated the game laws. It may be very juſt in this ſingular caſe to conſider the prohibition as *merely conditional*, either to forbear, or to pay the mulct: for no right of property ſeems invaded, nor the welfare of the community diſturbed. It might however be difficult to find an inſtance parallel to the foregoing[h]. Obedience to all ſuch laws as are not, according to the intention of the authors thereof, *conditional*, though merely poſitive, tends to the good of the ſociety, which it is the duty of every citizen to promote, in return for the common protection afforded, and becauſe of the moral neceſſity he is under to fulfil his compacts and engagements, and conſequently to obey whatever is ordained by the ſupreme legiſlature, not being contrary to the divine law of reaſon and religion.

GENERALLY alſo the political expedience of the poſitive law is manifeſt. Where, for example, the poſitive regulations, enacted to improve the public trade, revenues, and manufac-

[g] Black. Comm. introd. §. 2.
[h] V. Puff. b. viii. c. 1. §. 1. and c. 3. §. 4. Grot. b. ii. c. 2. §. 5.

tures,

tures, are violated and ſcorned, that nation is evidently intereſted in the tranſgreſſion. Here, then, I apprehend it is not ſufficient to diſcharge the conſcience, to be ready to ſatisfy the penalty on detection. Thus alſo every citizen ought, according to his ability, to benefit the ſociety of which he is a member. If, according to the laws of his country, he is appointed to a burthenſome, but neceſſary, office, amid the various capacities of civil life, there is a duty (I do not ſay how ſtrong) of ſerving it. To pay the fine falls ſhort of the obligation, unleſs where the intention of the lawgiver is, according to the former diſtinction, *merely conditional*; or where the perſon appointed has a juſt, not a ſelf-indulgent, pretext for exoneration. Thus moral and civil duty are in general inſeparably interwoven, though differing both in nature and degree.

HAVING thus far treated of the ſubject matter of civil laws, I ſhall next conſider them as conſiſting of two eſſential *parts*; namely, the definitive, declaring what things are to be done or forborn; and the ſanction, either generally or ſpecifically ordaining the conſequence.

THE ſanction of civil laws, it is well known, much oftener conſiſts in puniſhment than reward: for which the learned and ſagacious Puffendorf[i] mentions two reaſons; firſt, becauſe the ſecure enjoyment of natural and civil rights of itſelf largely compenſates obedience; ſecondly, becauſe if particular remunerations were beſtowed, no ſtock would be ſufficient for ſo profuſe a bounty. This reaſoning has its weight: but the fact, as to the occaſion of it, may be more obviouſly accounted for. Legiſlators expect that there may be ſome tranſgreſſors; but that the bulk of their ſubjects will conform to their inſtitutions: if all the obedient were to receive reward, judicial buſineſs would be the general occupation of mankind.

IT has alſo been remarked, that the infliction of evil is more operative than the poſſeſſion of good. This perhaps, as to the

[i] B. i. c. 6. §. 14.

diſpoſition of moſt men, may be true; but it does not immediately follow, that the terrors of one are more efficacious than the allurements of the other, when both are at an equal diſtance, and in ſome degree of uncertainty. Preſent uneaſineſs, the forcible ſtimulator of the will, may be occaſioned as well by the abſence or privation of ſome deſired object, propoſed for the reward of obedience, as by the terror of impending vengeance, threatened for the puniſhment of tranſgreſſion[k]. The compulſory quality therefore of human laws, or, more properly ſpeaking, the moral neceſſity of complying with them, may be produced by menaced puniſhment or proffered reward[l]. Each of them at different ſeaſons actuates the will.

THE virtual *effects* of law (as Modeſtinus[m] writes) are to injoin, to forbid, to permit, and to puniſh. Where[n] the laws are ſilent, and where they are expreſs, permiſſion is equally to be aſcribed to them, as to matters not reſtrained by the rules of natural morality and religion. Nor is there any want of obligatory force in ſuch caſes. For what the laws permit me to do or enjoy, they virtually prohibit others from obſtructing, on the peril of their diſobedience. In all theſe things we may trace and reſpect the conduct of legiſlators; as the character of private individuals alſo is marked by what they do, and what they abſtain from doing. Where there are but few reſtraints in matters permitted by the law of nature, and a moderate acceſſion only of *poſitive* duties, there legal liberty abounds, and there legiſlators have executed their important truſt with mildneſs and reſerve.

So far as civil laws, in regard either to their ſubject matter or their ſanction, are merely poſitive, ſo far they are juſtly liable to variation, and ought in ſome meaſure to be adapted to the exigence of the times, and the diſpoſitions of the people[o]—

[k] V. Locke on Hum. Und. b. ii. c. 21. §. 35.
[l] Puff. b. i. c. 6. §. 14. *ad fin.*
[m] D. l. i. t. 3. l. 7.
[n] Puff. b. i. c. 6. §. 15. *Barb. comm. ibid.* Taylor's civ. law, t. law and right.
[o] Grot. prolegom. §. 5.

"*varia*

"*varia pro moribus, et apud eoſdem pro temporibus ſæpe mu-*
"*tata.*"

TO diſcern the fitneſs of political inſtitutions, is the nobleſt exertion of human prudence[p], and has of old been thought the moſt neceſſary occaſion of imploring the co-operation of divine aſſiſtance. Hence the Pagans of every country deified their legiſlators; and hence that device of antient Mythologiſts, recited by Plato[q], was framed to ſhew, that it requires a nature more than human, to regulate perfectly the eſtabliſhment and well-being of civil ſociety. Another paſſage of the ſame genuine philoſopher may more immediately intereſt our attention, where he admoniſhes the founders of ſtates in the firſt place to invoke the Deity, that he would be preſent, and propitious to their undertakings—"*συνδιακοσμησων την τε πολιν και τους νομους.*" The religious duty preſcribed by this Athenian theologiſt, is exactly what is performed in the Britiſh Senate, before the important deliberations of the day begin.

THE moſt requiſite *qualities* of civil inſtitutions are, that they be conformable to the moral law; that they ſpeak a general language, exempt from partial diſcriminations; and that they chiefly reſpect the welfare of the whole community. The laws ſhould obſerve equality; nor would any man wiſh a greater indulgence than they allow, on condition that the ſame licence were extended to others. This conſideration ſhews the true character and uſefulneſs of civil reſtraints.

IT is very obvious, that all new inſtitutes ought to be properly *promulgated*; which is the more neceſſary, ſince it is an eſtabliſhed doctrine, at leaſt in this country, that ignorance of the law does not excuſe men from its coercion. It is to be wiſhed, therefore, that a due method could be deviſed of apprizing men (particularly the inferior claſs) not only of recent ſtatutes, but of ſuch other general heads of the law, as are moſt important to be known. If this was done, by reading or exhi-

[p] Hook. Eccl. Pol. b. i. §. 16. marg.
[q] *De leg.* l. iv.

biting

biting them in places of divine worſhip, it might add to the veneration due to our legal polity, more eſpecially to thoſe proviſions, which are enacted to promote the precepts of natural morality.

ANOTHER maxim of legiſlation is, That the laws be few[r] in number. This rule is not of equal validity, as to all branches of municipal inſtitutions[s]; but it chiefly reſpects the criminal code. A multitude of penal laws may be difficult to be remembered, reconciled, or underſtood.

LASTLY, The laws ſhould have ſtability. Frequent changes and innovations leſſen the reſpect due to them, in like manner as unſteadineſs of conduct brings men into diſeſteem.

I PROCEED now to the methods of *interpreting* civil laws; which are either merely intrinſic, taken from the words, context, and ſubject matter; or derived from conſiderations more remote. Thus, among the latter, cuſtom has great weight: "*Optima eſt legum interpres conſuetudo*," is a maxim both of Engliſh[t] and Roman[u] juriſprudence. It is material alſo to enquire how an ordinance was underſtood at the time of paſſing it: for we are often told in the writings of Lord Coke[w], that "*contemporanea expoſitio eſt fortiſſima in lege.*" Another maxim of the Digeſts may very juſtly be attended to, "that "*in*[x] "*toto jure generi per ſpeciem derogatur, et illud potiſſimum habe-*"*tur, quod ad ſpeciem directum eſt.*" The meaning of which is, that, when the law deſcends to particulars, ſuch more ſpecial proviſions muſt be underſtood as exceptions to any general rules laid down to the contrary; and the general rules muſt not *(vice verſâ)* be alleged in confutation of the ſpecial proviſions. This notion alſo of the Civilians is adopted by us, as conveyed in the following uncouth expreſſions: "*generalis*[y] *clauſula* "*non porrigitur ad ea quæ ſpecialiter ſunt comprehenſa.*" But

[r] Tayl. civ. law, p. 172.
[s] Summ. Rom. law, pp. 73, 74, 75, in the notes. Puff. b. vii. c. 9. §. 5.
[t] 2 Inſt. 18.
[u] D. l. i. t. 3. l. 37.
[w] 2 Inſt. 11. 136. 4 Inſt. 138.
[x] D. l. L. t. 17. *li.* 80.
[y] 8 Rep. 118. b.

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the principal rule of interpretation is the reaſon of the law. Herein we muſt be careful to regard comprehenſive, not partial, principles of equity; not ſuch as are only applicable to, or derived from, the very ſingular concurrence of complicated circumſtances in the caſe to be ſolved. This would be wandering in an endleſs labyrinth; and would baniſh certainty from judicial deciſions. We muſt weigh the evil to be redreſſed, the remedy and relief to be promoted, and ſometimes the conſequences of determination on one ſide or the other, as they may affect individuals and the public. For the end of civil laws in general being the welfare of the community, the ſame muſt be had in view in eſtabliſhing their conſtruction. "*Omnes*[z] *leges* "*ad commodum reipublicæ referri oportet, et eas ex utilitate com-*"*muni, non ex ſcriptione, quæ in literis eſt, interpretari.*"

The laſt general conſideration to be mentioned in reſpect to civil laws, is the *period of their exiſtence*. They may then be repealed, either expreſsly, or by implication, founded on diſuſe. "*Rectiſſimè*[a] *etiàm illud receptum eſt, ut leges non ſolùm* "*ſuffragio legiſlatoris, ſed etiàm tacito conſenſu omnium per deſue-*"*tudinem abrogentur.*" It certainly requires very ſtrong grounds to preſume a law obſolete. Yet as the whole community includes as well the legiſlative power as its ſubjects, the total diſuſe of any civil inſtitution for ages paſt, may afford juſt and rational objections againſt inforcing the diſreſpected and ſuperannuated ordinance.

THESE obſervations may contribute to form a general idea of civil, poſitive, or inſtituted law.

[z] Cic. *de Inv.* l. i. c. 38.
[a] D. l. i. t. 3. l. 32. p. 1.

LECTURE